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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

NO. _____

CLEONA HOOPER
Petitioner

VS.

UNITED STATES OF AMERICA,
Respondent

PETITION FOR WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

AT CINCINNATI

DALE QUILLEN
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 19__

NO. _____

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PETITION FOR WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

AT CINCINNATI

TO THE HONORABLE, THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The petitioner, Cleona Hooper, defendant-appellant below, respectfully prays that a Writ of Certiorari issue to review the order entered against him on July 2, 1970, by the United States Court of Appeals for the Sixth Circuit in the case of United States of America vs. Cleona Hooper (No. 20,206), affirming the judgment of the United States District Court for the Eastern District of Tennessee in United States vs. Hooper, ___F. Supp. ____ (E.D. Tenn. 1969).

OPINIONS BELOW

The order of the United States District Court for the Eastern District of Tennessee, overruling petitioner's motion to suppress testimony printed in the appendix hereto, infra, Appendix C. The order of the United States Court of Appeals for the Sixth Circuit is unreported and is printed in the appendix hereto, infra, Appendix D.

The opinion of the United States Court of Appeals for the Sixth Circuit in the case of United States of America vs. Roy Whitehead (No. 18,607), on the basis of which petitioner's case was affirmed, is printed in the appendix hereto, infra, Appendix E.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C., §1254(1).

QUESTIONS PRESENTED

1. Did the trial court err in denying petitioner Hooper's motion to suppress testimony, which motion was made on the grounds that the officers whose testimony was sought to be suppressed discovered certain property by an unlawful trespass upon petitioner Hooper's home, premises and effects without a warrant of search or other lawful authority therefor.

2. The statutes of the Internal Revenue Code upon which the indictment is based compel self-incrimination, in violation of the Fifth Amendment to the Constitution of the United States of America, so that petitioner Hooper's conviction on count one of the indictment is null and void.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Constitution of the United States, Amendment V:
No person shall be *** nor shall be compelled in any criminal case to be a witness against himself, ***.

Constitution of the United States, Amendment IV:
The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Title 18, U.S.C.:

"§ 2. PRINCIPALS
(a) Whoever commits an offense against the United States, or aids, abets, counsels, commands, induces, or procures its commission, is a principal."

"(b)Whoever causes an act to be done, which if directly performed by him would be an offense against the United States, is also a principal and punishable as such. June 25, 1948, c. 645, 62 Stat. 684."

Title 26, U.S.C.:

"§5686. PENALTY FOR HAVING, POSSESSING, OR USING LIQUOR OR PROPERTY INTENDED TO BE USED IN VIOLATING PROVISIONS OF THIS CHAPTER

(a) General.--It shall be unlawful to have or possess any liquor or property intended for use in violating any provision of this chapter or regulations issued pursuant thereto, or which has been so used, and every person so having or possessing or using such liquor or property, shall be fined not more than $5,000, or imprisoned not more than 1 year, or both."

Title 39, Tennessee Code:

"39-2523. ATTEMPT TO MANUFACTURE INTOXICATING LIQUOR.--The offenses described in §§39-2521, 39-2522 shall be deemed to have been committed by any person who shall attempt to manufacture intoxicating liquor, either by assembling the necessary apparatus for the purpose of manufacturing intoxicating liquor as prohibited by law, or by doing any act preparatory to such manufacture; and any such attempt shall be punished as described in §39-2522. [Acts 1923, ch. 14, §2; Shan. Supp., §6793a24b1; mod. Code 1932, §11248.]"

"39-2524. POSSESSION OF A STILL--PENALTY.--It shall be unlawful for any person to have in his possession or control any still or other apparatus, or part thereof, used or intended to be used for the purpose of manufacturing intoxicating liquor as prohibited by law, and any person convicted of a violation of this section shall be deemed guilty of a misdemeanor, punishable by a fine of not less than one hundred dollars ($100) nor more than five hundred dollars ($500), and by confinement in the county jail or county workhouse for a period of not more than one (1) year in the discretion of the trial court. [Acts 1923, ch. 12, §1; Shan. Supp., §6798a25b1; mod. Code 1932, §11249.]:

"39-2525. POSSESSION OF STILL AS PRIMA FACIE EVIDENCE OF PURPOSE.--When any person is found in the possession or control of any still or apparatus, or part thereof, suitable or designed for the manufacture of intoxicating liquor, such possession or control shall be deemed prima facie evidence in a prosecution under §§39-2521--39-2524 that such possession or control was for the purpose of manufacturing intoxicating liquor as prohibited by law. [Acts 1923, ch. 12, §2; Shan. Supp., §6798a25b2; Mod. Code 1932, §11250.]"

STATEMENT OF THE CASE

A two count indictment was filed against petitioner Cleona Hooper on April 3, 1969. Count one charged Hooper and a co-defendant with possession of liquor intended for use in violating the provisions of the Internal Revenue laws of the United States, in violation of Title 26, §5686 (a), U.S.C., and Title 18, § 2, U.S.C.

Petitioner Hooper filed a motion to suppress testimony, which motion is incorporated in the appendix. By memorandum opinion and order (incorporated in the appendix) the trial court denied said motion to the extent that it related to the contraband in count one of the indictment, but granted said motion as it related to the fruits of the post-arrest search and seizure enumerated in count two. Said order was entered subsequent to a hearing on said motion. On motion of the United States Attorney count two of the indictment as to the defendant Cleona Hooper was dismissed.

The case was tried before a jury on December 18, 1969. The jury found petitioner Hooper guilty as charged in count one of the indictment. On January 30, 1970, judgment was entered and petitioner Hooper was given five years' probation. Appeal was taken to the United States Court of Appeals for the Sixth Circuit whereupon on July 2, 1970, the decision of the lower court was affirmed, whereupon this Writ of Certiorari is prayed.

The essential facts of this case, as brought out in the hearing on petitioner Hooper's motion to suppress, are as follows:

On February 25, 1969, co-defendant Williamson was driving an unmarked government car with Federal agent Reece as a passenger; concealed in the trunk were agents Riddle and Whitlow; Reece, as an undercover agent, had negotiated sigh co-defendant Williamson to buy some illegal whiskey;

the purpose of the agents stealthy set-up on said date was to get co-defendant Williamson to lead them to illegal whiskey that could be used as evidence in prosecuting for violation of the appropriate liquor laws; co-defendant Williamson drove the agents on to the premises of the petitioner Hooper's residence without Hooper's knowledge and while he was absent; agent Reece viewed some boxes on Hooper's back porch and was told by co-defendant Williamson that said boxes contained whiskey; after Hooper arrived agent Reece went upon said back porch and took from one of said boxes a jar alleged to have contained whiskey; whereupon, agent Reece released the hidden agents from the trunk of the government car and co-defendant Williamson and petitioner Hooper were arrested; after Hooper was removed from the premises, a general search of the area revealed the items listed in count two of the indictment.

ARGUMENT

PROPOSITION I

Whether the trial court erred in denying petitioner Hooper's motion to suppress testimony, which motion was made upon the grounds that the officers whose testimony was sought to be suppressed discovered certain property by an unlawful trespass upon petitioner Hooper's home, premises, and effects, without a warrant of search or other lawful authority therefor.

A case strikingly similar to the case instant was decided by the trial court in 1962: United States vs. Cook, 213 F. Supp. 568.

In Cook, a specially employed government operative drove onto the defendant's premises in an unmarked government car in which two federal agents, having no search warrant, were concealed in the trunk. When the defendants began to load whiskey into the car the hidden agents emerged and arrested them. In sustaining the defendant's motion to suppress, the trial court stated:

> "Unquestionably these revenue agents made an unauthorized physical penetration into the premises of the defendant Cook when they inspired the movement of their informer's automobile onto such premises while they were concealed in its trunk. The Supreme Court of the United States '*** has never held that a federal officer may without a warrant and without consent physically entrench into a man's *** home ***' and

thereby obtain evidence for use against him at his subsequent criminal trial. Silverman v. United States (1961), 365 U.S. 505, 81 S.Ct. 679, 5 L.Ed.2d 734, 739. While Silverman, supra, involved the unlawful invasion of a person's privacy by eavesdropping, the court's decision was '*** based upon the reality of an actual intrusion into a constitutionally protected area.' Idem., 365 U.S. at p. 512, 81 S.Ct. at pp. 682, 683, 5 L.Ed.2d at p. 739.

[1-4] Where the uncontradicted evidence shows that the officers came upon the premises without the knowledge of the defendant, and thus he could not reasonably be found to have voluntarily permitted them to come for any purpose, any subsequent search and seizure are unlawful and the evidence procured thereby is inadmissible. Strong v. United States, C.C.A. 1st (1931) 46 F.2d 257." Id., at 571 (Emphasis added)

The trial court's exhaustive opinion in the Cook case is supported by the ample authority it cited and by additional authority as well. Petitioner Hooper submits there is no meaningful distinction between the instant situation and that in Cook. Here the agents went upon the Hooper's premises without a search warrant and viewed his residence with an eye toward obtaining evidence, all of which was done without Hooper's knowledge and in his absence.

In United States v. Reckis, D.C. Mass. 1954, 119 F. Supp. 687, cited in Cook, "federal officers entered on the defendant's property and obtained the key to a barn by falsely representing that they had been sent by the 'boss' to repair an illicit distillery...." Davis, Federal Searches and Seizures, p. 27. The court in Reckis stated:

"*** The entry on the property of Reckis was made under false pretenses. His acquiescence in the presence of the agents and his delivery of the key to the building to be searched were procured solely by the false representations of Fletcher that the presence of the visitors was for a business purpose connected with the illegal distilling operations being conducted on the premises. A search and seizure carried out by such methods, i.e., fraud, must be held to violate the guarantees of the Fourth Amendment. Search and seizure are equally unreasonable

and equally violative of constitutional rights whether made subsequent to entry by force and violence, or to entry procured by stealth, fraud, or through social acquaintance, or in the guise of a business call.***". Id. at 690

For similar federal cases in Tennessee see Roberson vs. United States, 165 F.2d 752 (6th Cir., 1948); Baxter vs. United States, 188 F.2d 119 (6th Cir., 1951); United States vs. Costner, 217 F.Supp. 644 (Tenn.E.D., 1963).

Petitioner Hooper commends to this Court the language cited in Cook:

"'Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. *** If the Government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy.' Nor can it lightly be assumed that, as a practical matter, adoption of the exclusionary rule fetters law enforcement. ***" Id., at 573

Petitioner Hooper submits that the tactics employed by the agents in this case do indeed breed "contempt for law". Perhaps this is the reason present counsel has found no case other than Cook in which these exact same tactics were employed. Apparently agents in other areas are able to do their jobs without secreting themselves in the trunks of automobiles and trespassing on private property. Petitioner submits that such tactics should not now be condoned by this Court, but should again be rejected as in Cook.

PROPOSITION II

Whether the statutes of the Internal Revenue Code upon which the indictment is based compel self-incrimination in violation of the Fifth Amendment to the Constitution of the United States of America, so that petitioner Hooper's conviction on count one of the indictment is null and void.

In support of this proposition, petitioner Hooper is relying upon the cases of Marchetti vs. U. S., 88 Sup.Ct.697, Grosso vs. U. S., 88 Sup.Ct. 709 and Haynes vs. U. S., 88 Sup. Ct. 722, with all of which this court is familiar, in that in

order to have lawfully possessed the liquors involved it would have been necessary for him to incriminate himself.

CONCLUSION

For the reasons stated above, petitioner Cleona Hooper respectfully submits that his conviction should be reversed and the case dismissed.

Respectfully submitted,

DALE QUILLEN
Attorney for Petitioner,
Cleona Hooper

APPENDIX A

INDICTMENT

(Filed April 4, 1969)

Count One

The Grand Jury charges that on or about the 25th day of February, 1969, in the Eastern District of Tennessee, Northeastern Division, CLEONA HOOPER, aided and abetted by CLAYTON WILLIAMSON, possessed liquor, to-wit, ninety gallons of distilled spirits intended for use in violating the provisions of the Internal Revenue Laws of the United States. (Title 26, Section 5686(a), United States Code; Title 18, Section 2, United States Code.)

Count Two

The Grand Jury further charges that on or about the 25th day of February, 1969, in the Eastern District of Tennessee, Northeastern Division, CLEONA HOOPER possessed property, to-wit, 760 pounds of damaged sugar, 1 - two-pound can of yeast, 24 empty one-half gallon glass jars, one 200-gallon galvanized proofing tank, 7 empty five-gallon fuel oil cans, and 1 radiator type condenser with steam line connections, which were intended for use in violating the provisions of the Internal Revenue laws of the United States. (Title 26, Section 5686(a), United States Code.)

.....
United States Attorney

A True Bill:

.....
Foreman

APPENDIX B

MOTION TO SUPPRESS TESTIMONY

(Filed April 28, 1969)

Defendant, Cleona Hooper, respectfully moves the Court for an Order suppressing the testimony of Charles G. Riddle, Steve B. Whitlow and any other agent of the United States Treasury Department or other persons acting in concert with them insofar as said testimony may pertain to ninety gallons of distilled spirits and seven 100 pounds of sugar allegedly possessed by the defendant on or about the 25th day of February, 1969, for the reason that said officers discovered said property by an unlawful trespass upon his home, premises, and effects without a warrant of search or other lawful authority therefor.

WHEREFORE, the defendant, Cleona Hooper, prays that he be granted a hearing on this motion and that upon said hearing the testimony of said officials and others acting in concert with them be suppressed by order of this Honorable Court.

Respectfully submitted,

Dale Quillen,
Attorney for Defendant
Cleona Hooper

(Served by mail.)

APPENDIX C

MEMORANDUM OPINION AND ORDER

(Filed November 20, 1969)

Aggrieved by a seizure from his back porch of contraband liquor, the defendant Mr. Hooper has moved the Court to suppress such contraband for use as evidence herein on the ground that it was seized illegally without a warrant. Rule 41 (e) (1), Federal Rules of Criminal Procedure. Evidence was received on the issues of fact necessary to the

decision of the motion on June 20, 1969. Final briefs were filed on September 12, 1969.

The search and seizure were accomplished on February 25, 1969 at the residence of Mr. Hooper near the elementary school at Cosby, Tennessee. Mr. Hooper testified that he had been away from his community all that day; that when he returned home at approximately 5:00 oclock, p. m., he saw an automobile parked off his driveway in his front yard, some 15 feet from his dwelling house, and about 25 feet from the Cosby-Newport highway; that he recognized as its occupants his codefendant Clayton ("Peawoody") Williamson, and a man whom he had met previously and had since learned was William M. Reece, a special investigator of the alcohol, tobacco & firearms division of the Internal Revenue Service, Treasury Department; that he had neither invited either of these visitors to his home nor given them permission to come there; that, after an interchange of greetings among them, without further conversation, he proceeded to his rear porch; that both his visitors did likewise, one of them parking the visiting automobile with its trunk next to this porch; that he noticed some cartons on the porch which were not there when he had left that morning and about which he knew nothing; that Mr. Reece made some inquiry or comment in connection with the quality "* * * of the whiskey * * *"; and that, when his visitors opened the trunk-lid of the visiting automobile to load the cartons into the vehicle, special AT&FD investigators Charles Riddle and Steve B. Whitlow, who were concealed therein, emerged therefrom and placed him and his co-defendant Mr. Williamson under arrest for unlawfully possessing taxunpaid whiskey.

Nothing more appearing, under such testimony, it is evident that these officers intruded upon the privacy of Mr. Hooper's residential premises, arrested him without

probable cause, and seized contraband discovered on the porch of his home in contravention of his right against unreasonable searches and seizures as guaranteed him by the Fourth Amendment to the federal Constitution. *United States* v. *Cook*, D. C. Tenn. (1962), 213 F. Supp. 568, 571 [1-4], [5], 571-572 [6, 7]. Accordingly, resort must be had to the particular facts preceding such entry, *United States* v. *Souther*, D. C. Tenn. (1962), 211 F. Supp. 848, 851 [2], to determine whether probable cause existed, justifying the raiding officers in arresting the defendant Mr. Hooper without a warrant, searching the cartons on his back porch, and seizing the contraband found therein, *i. e.*, warranting a prudent person of reasonable caution in believing that an offense was being committed. *Rios* v. *United States* (1960), 364 U. S. 253, 261, 80 S. Ct. 1431, 4 L. Ed. 2d 1688, 1693 [6].

The three officers, *viz.*, Messrs. Riddle, Whitlow and Reece, were investigating violations of the federal internal revenue laws relating to liquor in Cocke County, Tennessee (of which Cosby is a most distinctive part for these purposes) and its environs. Mr. Reece was working in an undercover capacity, and Mr. Riddle supervised his work. The latter had obtained a warrant for the arrest of the defendant Mr. Williamson for an alleged earlier offense.

On the day before the raid herein, Mr. Reece had arranged with Mr. Williamson for the purchase of 90 gallons of taxunpaid whiskey. When this information was communicated to Messrs. Riddle and Whitlow, it would have been sheer folly for Mr. Riddle to have served the arrest warrant upon Mr. Williamson until the outcome of Mr. Reece's agreed transaction was determined. As Mr. Reece had no information concerning the place the whiskey he was purchasing would be delivered to him, it was decided by the investigators that Messrs. Riddle and Whitlow

would conceal themselves in the vehicle Mr. Reece was to drive the next day. Thus, the officers could apprehend Mr. Williamson and whoever else might be implicated in any further law violation and simultaneously be available to protect Mr. Reece, if his undercover status became known to the suspected violaters.

Messrs. Reece and Williamson met the next day in Newport, Tennessee, in furtherance of their agreed transaction. Mr. Williamson directed Mr. Reece over the route to the point of delivery, known to Mr. Williamson but not to Mr. Reece. Pursuant to such directions, Mr. Reece stopped his vehicle twice: once for the installation thereon of overload-springs, and another time for Mr. Williamson to purchase paper bags for use in packaging the immediate containers of the liquor about to be delivered. While Mr. Williamson was out of the car on these occasions, Mr. Reece relayed to his concealed fellow-officers whatever information he had acquired since their most recent communication theretofore.

After the second stop, Mr. Williamson caused Mr. Reece to stop a third time and assumed the driving duties, in order that Mr. Reece might count-out to him the purchase money. Mr. Reece was advised that *the liquor would be delivered* to him *in cartons*. On arriving at his destination (*i. e.*, Mr. Hooper's home), Mr. Williamson again departed the vehicle and conversed with a female in the Hooper dwelling, while Mr. Reece described aloud the scene. The concealed officers assumed therefrom that Mr. Williamson had brought Mr. Reece to the Cleona Hooper residence.

On his return to the car, Mr. Williamson announced to Mr. Reece that "* * * Cleona * * *" was not at home but was expected momentarily. From his position in the automobile, *Mr. Reece could see cartons* stacked on the

rear porch of the dwelling. He inquired of Mr. Williamson "* * * if *that* was *the* whiskey * * *", and Mr. Williamson replied in the affirmative. The sum total of the knowledge acquired by Mr. Reece to, and including, this juncture would have warranted any prudent man of reasonable caution in believing that the occupant of this building was in the unlawful constructive possession, jointly with Mr. Williamson, of taxunpaid whiskey—a felony—; that delivery of the liquor theretofore purchased and paid for by Mr. Reece was to be made to him *at* that place; and that Messrs. Williamson and "Cleona" were engaging in a common unlawful plan.

That the defendant Mr. Hooper was the "* * * Cleona * * *" to whom Mr. Williamson had referred earlier, and was the person engaged in the commission of the offense by common plan with Mr. Williamson, were facts made to appear more fully when Mr. Hooper arrived on the scene. After Messrs. Hooper and Williamson conversed briefly, it was Mr. Hooper who preceded the vehicle, as Mr. Williamson drove it to the rear of the dwelling and directed its movement into the aforedescribed position at the porch.

Both the visible occupants of the car then alighted therefrom and joined Mr. Hooper on the porch. Mr. Reece removed from one of the *cartons* one jar, stating he wanted to check the quality of the liquor before it was loaded into his car. Mr. Hooper assured him it was "* * * good. * * *" After further general conversation, in which Mr. Reece advised Mr. Hooper that he had sufficient funds to buy only nine cases, and Mr. Hooper had stated there were 15 cases present, Mr. Williamson insisted that the liquor be loaded into the automobile. Whereupon, Mr. Reece unlocked the trunk of the vehicle, and the aforementioned arrests were made.

Mr. Hooper was taken immediately from the scene, and the remaining officers conducted a general search of

the area, including a small outbuilding behind the barn, a 1960-model automobile parked near the driveway, and a junked automobile at the rear of the premises. In each place they discovered materials which would have constituted materials intended for use in violating the federal liquor laws. By supplementary motion, Mr. Hooper complains further of this post-arrest search of his premises.

The after-arrest generalized search of the premises of Mr. Hooper was unreasonable and violated his Fourth Amendment constitutional rights. "* * * When an arrest is made, it is reasonable for the arresting officer to search the person arrested, in order to remove any weapons that the latter might seek to use in order to resist arrest or effect his escape. * * * In addition, it is entirely reasonable for the arresting officer to search for and seize any evidence on the arrestee's person in order to prevent its concealment or destruction. And the area into which an arrestee might reach in order to grab a weapon or evidentiary items must, of course, be governed by a like rule. * * * *There is ample justification,* therefore, *for a search of* the arrestee's person and the area 'within his immediate control'—construing that phrase to mean *the area from within which he might gain possession of a weapon or destructible evidence.*" [Emphasis supplied.]

"There is no comparable justification however, for routinely searching * * *. Such searches, in the absence of well-recognized exceptions,[1] may be made only under the authority of a search warrant. The 'adherence to judicial processes' mandated by the Fourth Amendment requires no less, * * *" *Chimel* v. *California* (1969), ... U. S. ....., ..., 89 S. Ct. ....., 23 L. Ed. 2d 685, 694 [4], overruling at pages 696-697 *Harris* v. *United States* (1947), 331 U. S. 145, 67 S. Ct. 1908, 91 L. Ed. 1399, and *United States* v.

1. None of which is applicable here.

Rabinowitz (1950), 339 U. S. 56, 70 S. Ct. 430, 94 L. Ed. 653.

The post-arrest search of Mr. Hooper's mobile and immobile automobiles and his out-building went far beyond his person, that of Mr. Williamson, and the area within which either might have obtained a weapon or were in a position to have destroyed evidence that could have been used against them. In so far as Mr. Hooper is concerned, these explorations were made after he had been taken from his home. There was no constitutional justification, in the absence of a search warrant, for the investigators' extending the search beyond the porch.

The only remaining issue is whether the officers made an unauthorized physical penetration onto the curtilage of Mr. Hooper, and there obtained information providing probable cause for his arrest and seizure of evidence for use against him and Mr. Williamson at their subsequent trial. Conceding that the investigators actually intruded a constitutionally protected area, *Silverman* v. *United States* (1961), 365 U. S. 505, 512, 81 S. Ct. 679, 682, 5 L. Ed. 2d 734, 739, this determination turns on the question of whether Mr. Hooper had given his implied consent to such penetration.

There is evidence here from which the reasonable inference may be drawn that Messrs. Williamson and Hooper had associated themselves together knowingly to carry out a common plan or arrangement, with the intent knowingly to sell unlawfully 90 gallons of taxunpaid whiskey, *before* Mr. Williamson knowingly brought their customer Mr. Reece to the Hooper premises. The membership therein of both of these defendants is established, respectively, by evidence of what each such defendant, himself, knowingly did and said; and the knowing participation of each respective defendant, in the plan or arrangement, with the

intent to advance or further some intended object or purpose of the plan or arrangement, is likewise established by the evidence. Thus, the act of Mr. Williamson in knowingly bringing Mr. Reece upon the premises of Mr. Hooper, in the absence of Mr. Hooper, (even without the latter's knowledge) during the continuance of this common plan or arrangement, and in furtherance of an intended object or purpose of the plan or arrangement, was the act of his partner Mr. Hooper, *United States* v. *United States Gypsum Co.* (1948), 333 U. S. 364, 393, 68 S. Ct. 525, 92 L. Ed. 746, 765 (headnote 4), and constituted consent of Mr. Hooper for Mr. Reece to be thereupon.

While it is obvious that Messrs. Riddle[2] and Whitlow were not on Mr. Hooper's premises with his consent, neither of them acquired any knowledge or information, as a result of their trespass thereupon, which formed any basis for their arresting these defendants. It was Mr. Reece who acquired such knowledge, and it was he who was then authorized to arrest Mr. Williamson, and after the appearance of "* * * Cleona * * *", to arrest Mr. Hooper. Certainly, Messrs, Whitlow and Riddle cannot be faulted for assisting Mr. Reece in effecting these arrests and in preventing the destruction of the evidence of the crime which Mr. Reece had obtained.

From all which the Court concludes that the knowledge available to Mr. Reece was sufficiently strong to have supported the issuance of a warrant for Mr. Hooper's arrest, *Worthington* v. *United States*, C. A. 6th (1948), 166 F. 2d 557, 565 [10], and, therefore, provided him with probable cause to arrest Mr. Hooper without a warrant, *Henry* v. *United States* (1959), 361 U. S. 98, 102, 80 S. Ct. 168, 4 L. Ed. 2d 134, 138-139 [4-6]; 26 U. S. C. § 7608, cited in

2. The equally interesting point of whether Mr. Riddle was properly on the premises of Mr. Hooper to serve the arrest warrant in his possession upon Mr. Williamson, is safely pretermitted.

United States v. *Barnett, et al.*, D. C. Tenn. (1967), criminal action no. 6947. this district and division (unpublished), and that the seizure of the liquor as evidence of the crime was incidental to such lawful arrest, *Agnello* v. *United States* (1925), 269 U. S. 20, 30, 46 S. Ct. 4, 70 L. Ed. 145, 148. To the extent that it relates to the liquor on Mr. Hooper's porch, accordingly, his motion to suppress evidence of this contraband hereby is DENIED.

As it relates to the fruits of the post-arrest search and seizure, however, Mr. Hooper's motion to suppress hereby is GRANTED. The property seized, not being subject under this record to lawful detention, those items listed in count two of the indictment herein will be RESTORED to Mr. Hooper. Rule 41 (e), Federal Rules of Criminal Procedure. Unless the prosecution has other evidence to support the charges contained in that count, it should be forthwith dismissed on motion of the United States attorney.

ENTER:

/s/ C. G. Neese
(C. G. Neese)
United States District Judge

For publication

APPENDIX D

No. 20,206

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee,	)	
V.	)	ORDER
CLEONA HOOPER, Defendant-Appellant.	)	

Before: McCREE and BROOKS, Circuit Judges, and O'SULLIVAN, Senior Circuit Judge

Following a jury trial, defendant-appellant appeals his conviction of aiding and abetting and for violations of the Internal Revenue laws. (Title 18 U.S.C. § 2; Title 26 U.S.C. §5686 (a). He complains of the partial denial of his motion to suppress, and attacks the constitutionality of the statutes under which he was convicted. Neither issue has merit.

Affirmed.

Entered by order of the Court

---s--- Carl W. Reuss
Clerk

Filed: July 2, 1970

APPENDIX E

No. 18607

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* v. ROY WHITEHEAD, *Defendant-Appellant.*	APPEAL from the United States District Court for the Eastern District of Michigan, Southern Division.

Decided March 3, 1970.

Before: PHILLIPS, Chief Judge, WEICK, EDWARDS, CELEBREZZE, PECK, MCCREE, COMBS, BROOKS, Circuit Judges, and O'SULLIVAN, Senior Circuit Judge

EDWARDS, Circuit Judge. This appeal presents constitutional issues upon which panels of this court have been divided. It was selected by the court *sua sponte* for in banc consideration. It was reargued before the entire bench in the December 1969 term of the court. The fundamental question presented is whether the Fifth Amend-

ment bars appellant's conviction on an indictment charging violations of the federal alcohol tax laws. We hold that it does not.

Appellant was convicted on seven counts of an eight-count indictment and sentenced to concurrent terms totaling four years. The counts charged appellant with possession, custody and control of a still, the making of mash, the transportation of raw materials to an unlawful distillery, and the possession of distilled spirits, all in violation of the federal tax laws.[1]

The record discloses extensive surveillance of the house in Detroit, Michigan, where ultimately the still and 800 gallons of mash were found. Appellant was seen going into the house carrying 60-pound sacks of sugar and coming out with paper bags containing something heavy and loading same in cars. Two such cars were stopped by Internal Revenue agents. Appellant, who was driving one of them, was arrested. Both cars were found to be loaded with nontax-paid whiskey. Thereupon a search warrant was procured for the house, the still was found, and appellant was indicted.

Appellant contends that the evidence was insufficient to sustain conviction on several counts, including Count 6 pertaining to the making of mash. He also contends that various provisions of the federal tax laws violated his Amendment rights under Supreme Court decisions in the *Marchetti*,[2] *Grosso*,[3] and *Haynes*[4] cases.

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1. 26 U.S.C. §§ 5173(a), 5601(a)(4), 5205(a)(2), 5179(a), 5601(a)(1), 5222(a)(1), 5601(a)(7), 5178(a)(1)(B), 5601(a)(6), 5180(a), 5681(c) (1964).

2. *Marchetti* v. *United States*, 390 U.S. 39 (1968).

3. *Grosso* v. *United States*, 390 U.S. 62 (1968).

4. *Haynes* v. *United States*, 390 U.S. 85 (1968).

We believe that the evidence of appellant's activity in and about the premises were acts which represented much more than presence at the site of a still (*see United States* v. *Romano*, 382 U.S. 136 (1965)) or assistance in only one phase of an illegal liquor business (*see Bozza* v. *United States*, 330 U.S. 160 (1947)). Appellant was seen engaged in activities from which the jury could have inferred that he was carrying supplies for illegal manufacture of liquor into a house and carrying the illegal liquor out. He was arrested while driving an automobile which contained illicit whiskey which the jury had every right to infer was a product of an illegal still operated by appellant.

As to the count which alleged illegal manufacture of mash, appellant was seen carrying heavy bags of sugar into the house where subsequently the still and some distilled liquor were found. The sugar bags were found empty in a closet in the house. Eight hundred gallons of mash were also found there.

All in all, there was both direct and circumstantial evidence from which the jury could have inferred appellant's guilt on all counts beyond a reasonable doubt. *Ramsey* v. *United States*, 248 F.2d 740 (6th Cir. 1957); *Chadwell* v. *United States*, 260 F.2d 257 (6th Cir. 1958).

Turning to the constitutional issue, we note that appellant herein did not seek to raise the Fifth Amendment privilege at trial. Nonetheless, we do not consider the privilege to have been waived in this case and we elect to decide this issue on its merits. *See Grosso* v. *United States*, 390 U.S. 62, 63, 70, 71, (1968); *Drennon* v. *United States*, 393 F.2d 342 (8th Cir. 1968); *Greenwood* v. *United States*, 392 F.2d 558 (4th Cir. 1968); *United States* v. *Manfredonia*, 391 F.2d 229 (2d Cir. 1968); *Harris* v. *United States*, 390 F.2d 616 (8th Cir. 1968); *but see Howard* v. *United States*, 397 F.2d 72 (9th Cir. 1968).

We are urged to hold these tax measures unconstitutional in that they require the performance of certain affirmative acts; here, the posting of a sign at the site of a lawful distillery, the furnishing of bond, the purchase and affixing of tax stamps and the filing of registration information. Appellant asserts that these affirmative acts might create for some prospective taxpayers in some possible situations "hazards of incrimination . . . [which] are not trifling or imaginary." *Marchetti* v. *United States*, 390 U.S. 39, 54 (1968).

At the outset we emphasize that we do not read these words as having been written as a litmus paper test of constitutionality. It is "compelled" self-incrimination against which the Fifth Amendment has been held to offer protection. Every criminal act, no matter how voluntary, creates some real hazard of incrimination. And where regulatory legislation provides penalties for failure to perform certain acts normally the Fifth Amendment does not apply because the omission is not deemed "compelled."

We do not think that the Supreme Court has as yet provided a wholly clear rationale for distinguishing constitutional exercise of taxing and regulatory powers from those situations wherein fatal Fifth Amendment conflicts are to be found. In such a situation we would proceed with some caution and with strict construction of the case holdings if the issue involved appeared to be in doubt. In our instant case, however, we believe there is no reason for doubt.

There are clear and important distinctions between the currently disputed provisions of alcohol tax statutes and those statutory provisions which were held vulnerable to attack on Fifth Amendment grounds in the *Marchetti*, *Grosso* and *Haynes* cases. (*See also Leary* v. *United States*, 395 U.S. 6 (1969)).

Underlying the series of cases to which we have referred is the Supreme Court's holding in *Albertson* v. *SACB*, 382 U.S. 70 (1965). The Supreme Court there distinguished between the *Sullivan* case (*United States* v. *Sullivan*, 274 U.S. 259 (1927)) which upheld as constitutional the requirement of filing an income tax return, and an order requiring a Communist to register as such and thus furnish evidence of his violation of two federal criminal statutes.

In *Albertson* the Supreme Court said:

> "In *Sullivan* the questions in the income tax return were neutral on their face and directed at the public at large, but here they are directed at a highly selective group inherently suspect of criminal activities. Petitioners' claims are not asserted in an essentially noncriminal and regulatory area of inquiry, but against an inquiry in an area permeated with criminal statutes, where response to any of the form's questions in context might involve the petitioners in the admission of a crucial element of a crime." *Albertson* v. *SACB*, *supra* at 79.

The Public Purpose

The alcohol tax laws are "essentially noncriminal" revenue measures. Until the Sixteenth Amendment to the United States Constitution (income tax), taxes on alcoholic beverages provided the fundamental financing of the United States government.

Even after enactment of the federal income tax, the alcohol tax laws constitute substantial revenue producing measures.

As the Fourth Circuit has noted:

> "In 1966, the taxes on distilled spirits produced $3.7 billion in internal revenue. The wagering tax

scrutinized in *Marchetti* produced 'in the past several years' only $115 million. 390 U.S. at 82, 88 S.Ct. at 721.

"We think the failure of these defendants to designate place of manufacture and to post a distillery bond is due to their wish to avoid the federal tax of $10.50 per gallon on distilled spirits. The evasion of tax alone provides the enormous margin of profit in the white whiskey business and accounts for the delinquency here. It lies well within the power of Congress to exercise a regulatory function to enforce the collection of such lawfully due taxes." *United States* v. *Walden*, 411 F.2d 1109, 1112 (4th Cir. 1969). (Footnote omitted.)

In a preprohibition case, the United States Supreme Court provided this description of the alcohol tax laws of that day — a description which we feel entirely appropriate to describe the statute currently under attack:

"It is clear, even upon a cursory reading, that the well-considered and minute provisions of the Revised Statutes found in chapter 4, entitled 'Distilled Spirits,' of Title XXXV., entitled 'Internal Revenue,' were adopted with one purpose only, namely, to secure the payment of the tax imposed by law upon distilled spirits.

"All the regulations for the manufacture and storage, the marking, branding, numbering, and stamping with tax stamps, of distilled spirits, and all the penalties, forfeitures, fines, and imprisonments prescribed by the chapter mentioned, have that end only in view. If the tax on distilled spirits were repealed, all the ingenious and complicated provisions of the chapter would become useless and insensible." *United States* v. *Ulrici*, 111 U.S. 38, 40 (1884).

Returning to the language of *Albertson*, the statutory provisions here attacked are "neutral on their face and directed at the public at large." The manufacture of alcoholic beverages is lawful under some circumstances in all 50

states and the District of Columbia and the taxes are collected from thousands of persons engaged in lawful sale and distribution of these products.

The Fifth Circuit has expressed this view in a case upon which the Supreme Court has already denied certiorari:

> "Perhaps if this prosecution had occurred under an appropriate statute that existed during the short life of the Eighteenth Amendment to the United States Constitution, appellants could properly equate their situation to the appellants in Marchetti. As it is, however, we are informed by the government's brief, and it is not disputed, (a matter of which we can take judicial notice) that possession of distilled spirits is legal to some extent in every one of the fifty states of the union. Therefore, we find ourselves in agreement with those district courts in addition to the trial court here, which have held that there is no danger of self incrimination resulting from the requirement of Sections 5205(a)(2) and 5604(a)(1) relating to the placing of stamps and taxing of distilled spirits." *Brown* v. *United States*, 401 F.2d 769, 770 (5th Cir. 1968), *cert. denied*, 394 U.S. 962 (1969).

The Effect on the Individual

Regardless, however, of what we have written thus far pertaining to the purpose of the alcohol tax laws, appellant would argue that the Fifth Amendment privilege depends upon no such balancing of rights and is absolute as to him. We cannot perceive, however, how the affirmative acts here objected to can be held to represent compelling this appellant "in any criminal case to be a witness against himself." U. S. Const. amend. V. Contrary to the facts in the *Albertson* case, these statutory provisions are not aimed at exposing "a highly selective group inherently suspect of criminal activities" to prosecution under other criminal stat-

utes. Nor do we find here a compelled response which might involve "the admission of a crucial element of a crime."

These statutes do apply generally to all who manufacture liquor, including many persons or organizations who do so entirely lawfully within the State of Michigan. We find here no purpose to aid state officialdom in suppressing activities generally rendered illegal by state law. *Cf. Marchetti* v. *United States, supra*; *Grosso* v. *United States, supra.*

We certainly do not find here that "Congress intended information obtained as a consequence of [the requirements of these statutes] to be provided to interested prosecuting authorities." *Marchetti* v. *United States, supra* at 58, 59.

Nor do we find that these statutes have "an obvious purpose . . . to coerce evidence from persons engaged in illegal activities for use in their prosecution." *Grosso* v. *United States, supra* at 74 (concurring opinion).

Indeed, the alcohol tax statutes were drafted with the purpose of keeping persons of ill-repute out of the alcohol beverage manufacturing business. *Seaway Beverages, Inc.* v. *Dillon,* 319 F.2d 722 (D.C. Cir.), *cert. denied,* 375 U.S. 923 (1963). And these federal statutes — in place of seeking to expose a limited class of law violators to state prosecution (*Cf. Marchetti, Grosso* and *Haynes*) — prohibit issuance of a basic permit upon a finding "that the operations proposed to be conducted by such person are in violation of the law of the State in which they are to be conducted." 27 U.S.C. § 204(a)(2)(C) (1964).

Absent the prior securing of the basic permit on a showing of compliance with state law, it is greatly to be doubted that any other of the affirmative acts required as a prerequisite to legal manufacture of alcoholic beverages under fed-

eral law (*i.e.*, posting of bond, securing and posting of a distillery sign, securing and affixing of tax stamps) could actually be performed.

For example, Title 27 §203 makes it unlawful to manufacture, ship or sell any distilled spirits, except pursuant to the basic permit referred to above. And appellant in this case (if we hypothesize his ability to show compliance with state law) could not have received such a basic permit to manufacture distilled spirits on the premises involved in this case because 26 U.S.C. §5178 flatly prohibits such a plant "in any dwelling house."

The possibility of appellant's self-incrimination by dint of actual compliance with the statutory provisions attacked herein is considerably less than "purely hypothetical." *Cf. Minor* v. *United States*, —— U.S. (1969). (Decided Dec. 8, 1969, Slip op. p. 10).

In summary, the statutory provisions attacked in this appeal are a far cry from the statutory provisions invalidated in *Marchetti*, *Grosso* and *Haynes* which the Supreme Court held deliberately sought to expose federal registrants to state prosecution. Here federal registration is prohibited unless the registrant is in compliance with state law. This appellant could not, if he had tried, have gotten his name on any list of federal registrants because that list was a list of lawful distillers under both state and federal laws and not as in *Marchetti* and *Grosso* a list of gamblers whose activities were illegal under state law. Judge McCree's dissent suggests that appellant might have "attempted" registration and in effect told the federal authorities of his intention to make white whiskey in residential premises. Since there would have been no conceivable federal statutory benefit from such a disclosure, we cannot perceive how it could be deemed "compelled" in any Fifth Amendment sense.

We find no abuse of appellant's Fifth Amendment rights.

While this is a case of first impression in this court, we are by no means plowing new ground in the federal law. Three circuits and many District Courts have already reached the same conclusion. *United States* v. *Fricano*, 416 F.2d 434 (2d Cir. 1969); *United States* v. *Walden*, 411 F.2d 1109 (4th Cir. 1969); *Wilson* v. *United States*, 409 F.2d 604 (5th Cir.), *cert. denied*, 395 U.S. 923 (1969); *Thornburg* v. *United States*, 406 F.2d 1060 (5th Cir. 1969); *Grant* v. *United States*, 407 F.2d 56 (5th Cir. 1969); *Hall* v. *United States*, 407 F.2d 1320 (5th Cir. 1969); *United States* v. *Ellington*, 406 F.2d 348 (5th Cir. 1969); *Shoffeitt* v. *United States*, 403 F.2d 991 (5th Cir. 1968), *cert. denied*, 393 U.S. 1084 (1969); *Anderson* v. *United States*, 403 F.2d 206 (5th Cir. 1968); *Brown* v. *United States*, 401 F.2d 769 (5th Cir. 1968), *cert. denied*, 394 U.S. 962 (1969); *United States* v. *Young*, 284 F. Supp. 1008 (E.D. Tenn. 1968); *United States* v. *Richardson*, 284 F. Supp. 419 (M.D. Ala. 1968); *United States* v. *McGee*, 282 F. Supp. 550 (M.D. Tenn. 1968). *Contra*, *United States* v. *Fine*, 293 F. Supp. 189 (E.D. Tenn. 1968).

The judgment of the District Court is affirmed.

McCREE, Circuit Judge (dissenting in part). I would affirm appellant's conviction on count 6 for making and fermenting mash on premises not lawfully qualified for the production of distilled spirits in violation of 26 U.S.C. §§ 5222(a)(1) and 5601(a)(7) and on count 7 for aiding and assisting in the use of a still for the production of distilled spirits in a dwelling house in violation of 26 U.S.C. §§ 5178(a)(1)(B) and 5601(a)(6). Appellant's only objection to his convictions on these counts is directed to the sufficiency of the evidence to uphold these convictions, and I agree that the evidence is sufficient to uphold them.

I would, however, reverse appellant's convictions on count 1 for carrying on the business of a distiller without giving bond in violation of 26 U.S.C. §§ 5173(a) and 5601(a)(4); on counts 3 and 4 for possessing and transporting distilled spirits in containers not having affixed thereto the required venue stamps in violations of 26 U.S.C. §§ 5205(a)(2) and 5604(a)(1); on count 5 for possessing an unregistered still in violation of 26 U.S.C. §§ 5179(a) and 5601(a)(1); and on count 8 for carrying and delivering raw materials to an unlawful distillery at which no sign was posted in violation of 26 U.S.C. §§ 5180(a) and 5681(c). I would reach this result because appellant's refusal to comply with the statutory requirements upon which these convictions are based was a proper exercise of his fifth amendment privilege against self-incrimination and therefore he may not be criminally punished for his failure to comply. *See Marchetti* v. *United States*, 390 U.S. 39, 61 (1968).

The fifth amendment provides, in pertinent part, that "No person . . . shall be compelled in any criminal case to be a witness against himself . . . ." In a series of recent decisions involving the relationship between this privilege and the Government's right to require a person, upon threat of criminal prosecution, to provide potentially incriminating information, the Supreme Court has decided that "The *central standard* for the privilege's application [is] whether the claimant is confronted by substantial and 'real,' not merely trifling or imaginary, hazards of incrimination." *Marchetti* v. *United States, supra* at 53 (emphasis added). *Accord, Grosso* v. *United States*, 390 U.S. 62 (1968); *Haynes* v. *United States*, 390 U.S. 85 (1968); *Leary* v. *United States*, 395 U.S. 6 (1969). If the obligation to provide information creates " 'real and appreciable', and not merely 'imaginary and unsubstantial,' hazards of self-incrimination," a person cannot be criminally

punished for refusing to comply. *Marchetti* v. *United States, supra* at 48.

At the outset, it should be observed that this standard renders inapposite one of the factors relied on by the majority to distinguish *Marchetti, Grosso, Haynes* and *Leary* from the present case. For example, the majority points out that the alcohol tax laws are "essentially non-criminal revenue measures" and that the purpose of the disclosure provisions is to facilitate securing the payment of the taxes imposed and not to aid law enforcement officials in their efforts against illegal manufacturers of distilled spirits. However, regardless of the Congressional purpose for inclusion of the disclosure provisions in the alcohol tax laws, the refusal to comply with these provisions cannot be criminally punished if compliance would create substantial and real hazards of self-incrimination. *See generally Counselman* v. *Hitchcok*, 142 U.S. 547, 585 (1892).[1] The question before us, then, is whether appellant ". . . may be compelled to give evidence against himself." *Marchetti* v. *United States, supra* at 51.

Considering the substantiality of the risk of self-incrimination if appellant complied with the disclosure provisions of the alcohol tax laws, the majority concludes that the degree of risk involved is "considerably less than 'purely hypothetical'" (1) because the disclosure provisions are "directed at the public at large" and not "at a highly selective group inherently suspect of criminal activities", *Albertson* v. *SACB*, 382 U.S. 70, 79 (1965), and (2) because it is doubtful, in any event, whether appellant would ever have the opportunity to perform the affirmative acts of disclosure.

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1. It is interesting to speculate on the effect on the privilege against self-incrimination of a doctrine which would permit infringement of the privilege if occasioned by a legitimate Congressional purpose, since the suppression of criminal activity, in certain areas, would be a legitimate Congressional purpose.

Admittedly, compliance with a statutory provision requiring the disclosure of illegal activity creates a greater risk of self-incrimination when the disclosure requirement is directed at a "group inherently suspect of criminal activities," since it identifies the discloser as a member of the suspect group. *Leary* v. *United States*, *supra* at 18. *See also Marchetti* v. *United States*, *supra* at 57; *Grosso* v. *United States*, *supra* at 68. However, the character of the group subject to a disclosure requirement certainly is not by itself determinative of the substantiality of the risk of self-incrimination attendant on compliance with such a requirement. Even if the requirement is not directed at an inherently suspect group, the risk encountered as a consequence of compliance may still be "real and appreciable".

Indeed, manufacturers of distilled spirits are a prime example of this. Although distillers may not be a "group inherently suspect of criminal activities," they are involved in a business which is subject to extensive state and federal controls. In Michigan, the liquor industry is an area permeated with statutory requirements, the violation of which can be criminally punished. *See, e.g.*, Mich. Comp. Laws §§ 436.1, 436.2, 436.17, 436.19, 436.22, 436.32, 436.50. Moreover, at the time appellant was engaged in the illegal manufacture of distilled spirits, there was a statutory requirement that certain internal revenue offices maintain a list of persons who had paid the special taxes assessed on the manufacture of distilled spirits and that this list be furnished to any prosecuting officer of any state, county, or municipality upon request. 26 U.S.C. § 6107.[2] There

2. This provision was repealed, effective December 16, 1968, by Section 203 (a), Title II of the Gun Control Act of 1968, Pub. L. No. 90-618, 1968 U.S. Code Cong. & Adm. News 1423, but this does not affect the relevance of section 6107 to the substantiality of the risk of self-incrimination confronting appellant at the time of his illegal activity. *See Albertson* v. *SACB*, 382 U.S. 70, 77 (1965). Furthermore, although the internal revenue service is no longer required to compile a list of persons who pay the special alcohol taxes and to furnish this list to prosecuting officials, "neither has

is therefore sufficient attention focused on manufacturers of distilled spirits to indicate that the hazards of self-incrimination attendant on compliance with the disclosure provisions of the alcohol tax laws would be more than "merely trifling or imaginary."

The important inquiry then is whether, in reality, these hazards ever would materialize. *Cf. Leary* v. *United States*, 395 U.S. 6 (1969); *Buie* v. *United States*, No. 271 (U.S., Dec. 8, 1969); *Minor* v. *United States*, No. 189 (U.S., Dec. 8, 1969). The majority concludes that this is "greatly to be doubted" because a prerequisite to compliance with the disclosure provisions of the alcohol tax laws is the securing of a basic permit, 27 U.S.C. § 203(b)(1), and the Secretary of the Treasury is prohibited from issuing a basic permit when "the operations proposed to be conducted . . . are in violation of the law of the State in which they are to be conducted." 27 U.S.C. § 204(a)(2)(C).

The effect on the privilege against self-incrimination of practical barriers to actual compliance with provisions requiring disclosure of illegal activity depends on the nature of the barriers. In *Leary* v. *United States*, *supra*, the Government contended that there was no substantial risk of self-incrimination because one who intended unlawfully to purchase marihuana would know he could not obtain the order form which contained the incriminating questions and consequently never would apply for it. The Government also contended that even if the buyer did apply for an order form, it was doubtful that the unsuccessful application would be revealed to law enforcement officials. *Id.* at 18-20. The Supreme Court rejected both of these con-

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Congress imposed explicit restrictions upon the use of information obtained as a consequence of payment of the tax." *Grosso* v. *United States*, 390 U.S. at 66. *See Marchetti* v. *United States*, 390 U.S. at 60, n. 18.

tentions and concluded that "real and appreciable" hazards of self-incrimination did confront Leary because the Congressional intent, as revealed by the statutory scheme adopted, was that an unlawful purchaser of marihuana should be able to obtain an order form.

On the other hand, in *Buie* v. *United States*, *supra*, the Court decided that the practical barriers encountered by one who unlawfully sold marihuana were sufficiently insurmountable to preclude any real possibility that he actually would comply with the order form requirements and thereby incriminate himself. Indeed, it was the Court's earlier decision in *Leary* that reduced the hazards of self-incrimination to the point where they were "imaginary and unsubstantial" as far as the seller was concerned because its decision relieved the purchaser of marihuana of his obligation of obtaining the order form and of providing the seller with an opportunity to comply with its requirements and thereby incriminate himself. *Buie* v. *United States*, *supra* at 2 - 4 of slip. op.

The practical barriers to compliance confronted by appellant in the instant case are not as artificial as those in *Leary*, but neither are they as substantial as those in *Buie*. Although a basic permit is a prerequisite to the lawful manufacture of distilled spirits, the absence of such a permit might not preclude appellant from complying with the provision requiring him to post a sign at the site of the still. 26 U.S.C. § 5180(a). Under the terms of the statute and the regulation adopted pursuant thereto, appellant apparently could have complied with this requirement merely by fabricating a sign containing the required information and installing it. *See* 26 C.F.R. § 201.235. Since "a sign placed conspicuously on the outside front or entrance [of the still] and exhibiting in readily legible and durable characters (a) the real name of the proprietor, (b) the

plant number, and (c) the designation of the kind of business", 26 C.F.R. § 201.235, would disclose the operation of the still, I think the hazards of incrimination attendant on compliance with 26 U.S.C. § 5180(a) are "real and appreciable". Accordingly, I would hold that appellant cannot be criminally punished for his failure to comply with this statutory provision.

The necessity of a basic permit and the prohibition on its issuance if the proposed operation violates the laws of the state probably would foreclose "literal and full compliance" with the statutory provisions requiring appellant to register the still and to file a qualification bond. 26 U.S.C. §§ 5179(a), 5173(a). However, the basic permit requirement would not prevent appellant from *attempting* to comply with the registration and qualification bond provisions by submitting an application. There is no statutory requirement that a distiller obtain a basic permit prior to filing an application for registration and a qualification bond.[3] Also, pursuant to 26 U.S.C. § 5171(a), "Every person *shall, before commencing* or continuing the business of a distiller . . . make application" for the registration of his still. (Emphasis added). Accordingly, under the statutory scheme adopted by Congress, a distiller can file the registration form and qualification bond simultaneously with his request for a basic permit. Moreover, the likelihood that a distiller would do this is increased by the fact that he can lawfully obtain distilling apparatus prior to securing a basic permit.

Similarly, appellant also would not be precluded from *attempting* to procure the revenue stamps which must be affixed to containers of distilled spirits. 26 U.S.C. § 5205(a)(2). Again, the likelihood of "literal and full compli-

3. The qualification bond is filed at the same time as the application for registration. 26 U.S.C. § 5173(a).

ance" is small, since the purpose of the stamps is to evidence compliance with the provisions of the alcohol tax laws. However, in determining whether appellant would attempt to comply with this requirement, and with those imposed by sections 5179(a) and 5173(a), I doubt that we are permitted to speculate that, in reality, he would not attempt to obey the law. Implicit in the Supreme Court's decision in *Leary* is the notion that regardless of whether, in reality, one who purchases marihuana illegally would attempt to obtain an order form, the Court, in analyzing the substantiality of the risks of self-incrimination, would assume that this was a realistic alternative for the purchaser.[4]

Therefore, even with regard to the registration, qualification bond, and revenue stamp requirements, the hazards of self-incrimination confronting appellant were greater than those confronting Buie. In *Buie*, the Court concluded that the seller would never have an opportunity to complete the order form and disclose his illegal activity.[5] Appellant, on the other hand, by attempting to comply with the requirements of 26 U.S.C. §§ 5170(a), 5173(a) and 5205(a)

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4. If the Court had not made this assumption, the substantiality of the risks of incrimination confronting Leary would have been no greater than those confronting Buie. In other words, if the Court took judicial notice of the fact that illegal purchasers of marihuana do not, in reality, attempt to comply with the requirement of obtaining an order form, the risks of self-incrimination confronting Leary would have been minimal. Accordingly, the significant distinction between *Leary* and *Buie* would seem to be that Leary could have attempted to obtain an order form and incriminate himself whereas Buie could not, since the obligation to procure the order form is on the purchaser. *See* 26 U.S.C. §§ 4705(a), 4742(a). In the present case, the various obligations imposed by the statutory provisions in question are on the distiller.

5. In *Buie*, the Court also observed that the statutory obligation to furnish the information requested on the order form was on the buyer and that this may eliminate the problem of "self-incrimination", as that term is ordinarily understood. In the present case it is the distiller himself who is obligated to disclose his activities.

(2), would reveal his intention to engage in the manufacture of distilled spirits.[6]

Of course, whether the potentially incriminating information provided by the attempt to comply would, in reality, ever be used by law enforcement officials to forge a " 'link in the chain' of evidence tending to establish his guilt," *Marchetti* v. *United States, supra* at 48, and thus, whether the hazards of incrimination involved in such an attempt are "real and appreciable", involves some conjecture. The court has before it no factual data indicating the likelihood that the information contained in unsuccessful applications to register, to post the qualification bond, and to obtain revenue stamps is passed on to other law enforcement officials. However, in the absence of such data, I would resolve the doubts in favor of the applicability of the Constitutoinal privilege.

Until recently, an exchange of information between treasury officials and prosecuting officers of states, counties, and municipalities with regard to persons paying the special taxes assessed on the manufacture of distilled spirits was mandated by 26 U.S.C. § 6107. Thus, the channels of communication have been established. Moreover, although 26 U.S.C. § 6107 has been repealed, *see* n. 2, *supra*, there are still no restrictions imposed upon the use of the potentially incriminating information contained in

6. The fact that appellant would be revealing an intention to violate the law at some future time may reduce the substantiality of the risks of self-incrimination, but it would not make these risks trifling or imaginary. "We see no reason to suppose that the force of the constitutional prohibition is diminished merely because confession of a guilty purpose precedes the act which it is subsequently employed to evidence . . . . [A]lthough prospective acts will doubtless ordinarily involve only speculative and insubstantial risks of incrimination, this will scarcely always prove true." *Marchetti* v. *United States*, 390 U.S. 39, 54 (1968), overruling *United States* v. *Kahriger*, 345 U.S. 22 (1953), and *Lewis* v. *United States*, 348 U.S. 419 (1955).

an application for registration or a qualification bond form. *See Grosso* v. *United States*, 390 U.S. at 66.

It is also relevant that "other methods, entirely consistent with constitutional limitations," *Haynes* v. *United States*, 390 U.S. at 98, could be employed to obtain the information provided by compliance with the statutory provisions in question. *See generally Counselman* v. *Hitchcock*, 142 U.S. 547, 585 (1892). *See also Adams* v. *Maryland*, 347 U.S. 179 (1954); *Murphy* v. *Waterfront Commission*, 378 U.S. 52 (1964). Thus, permitting appellant to invoke the privilege against self-incrimination in order to prevent criminal prosecution for failing to comply with these provisions would not "prevent the effective regulation or taxation by Congress" of distilled spirits. *Haynes* v. *United States*, *supra* at 98.

Accordingly, I would hold that sections 5170(a), 5173(a) and 5205(a)(2),[7] as well as section 5180(a), compelled appellant, upon threat of criminal punishment, to disclose his illegal activities and that the hazards of self-incrimination which would have resulted from disclosure were "real and appreciable". I would therefore reverse his convictions on counts one, three, four, five and eight.

Combs, Circuit Judge. I concur in Judge McCree's dissent. I am unable to find within the rule of *Marchetti* any distinction between "moonshiners" and members of "the syndicate."

O'Sullivan, Senior Circuit Judge. I concur in Judge McCree's dissent. I do so because I believe that his opin-

7. The fact that counts 3 and 4 are directed at appellant's possession and transportation of unstamped containers, and not at his failure to obtain revenue stamps *per se*, is irrelevant, since the effect of 26 U.S.C. § 5205(a)(2) is to require a distiller to obtain revenue stamps in order to lawfully possess and transport distilled spirits in containers. *See Haynes* v. *United States*, 390 U.S. 85, 90-95 (1968).

ion is more consistent with *Marchetti* v. *United States*, 390 U.S. 39 (1968) than the carefully prepared opinion of Judge Edwards. I believe that, whether operating in Michigan, Tennessee, or elsewhere, "moonshiners" make up a "group inherently suspect of criminal activities" just as much as the "big time" gamblers who enjoy the protection of *Marchetti*. Emphasis is placed upon the fact that the alcohol tax laws are "essentially non-criminal". This is so, it is argued, because such laws exist primarily to raise revenue. Such laws do, however, provide *criminal* sanction for their violation and in most states, while the manufacture of distilled spirits is not totally forbidden, the activity for which this defendant was convicted—"moonshining"—is criminal activity wherever it is carried on.

Distinction is asserted to exist because the statute involved in *Marchetti* was purposely passed by Congress to interrupt criminal conduct—"big time" gambling carried on, in part at least, by "the syndicate", a part of organized crime. It is argued that Congress cannot impair the Fifth Amendment rights of those so engaged, but may forbid use of the Fifth Amendment by those who choose to violate the revenue laws relating to distilled spirits. The "moonshiner" has been as effectively deprived of the protection of the Fifth Amendment when he is convicted for failure to announce his intention to engage in criminal activity as is the interstate gambler, convicted for failure to register and disclose his intention to engage in crime. I am unable to discern legitimacy in the nuances employed to find distinction between the "moonshiner" and members of "the syndicate". So long as *Marchetti* is the law, it should be followed without discrimination.